CONTRIBUTION TO THE PUBLIC CONSULTATION ON THE DRAFT REVISED REGULATION ON VERTICAL AGREEMENT AND VERTICAL GUIDELINES

SEPTEMBER 17, 2021

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1. In the context of the public consultation launched on July 9th, 2021, by the European Commission (hereinafter, the "Commission"), the Association of Lawyers Practicing Competition Law (hereinafter, the "APDC") presents the following observations regarding the Commission's published drafts of the revised Vertical Block Exemption Regulation (hereinafter, the "VBER") and of the Vertical Guidelines (hereinafter, the "VGL").

2. The APDC welcomes the update of the VBER and VGL and is of the opinion that the Commission should consider, in the future, updating them more frequently to take account of market developments and the new decisional practice.

3. This contribution follows the APDC's observations dated of March 25th, 2021, in response to the public consultation launched by the Commission on December 18th, 2020, as well as the observations dated of November 20th, 2020, regarding the public consultation opened by the Commission on October 23rd, 2020.

I. The treatment of platforms: a source of legal uncertainty for stakeholders

4. Recital 10[1] and Article 1.1 d)[2] of the draft Regulation provide that platforms will be qualified as "suppliers" within the meaning of the Regulation. They will therefore be artificially placed in a vertical relationship, which will be subject to the conditions of the Exemption Regulation and therefore to its market share thresholds.

5. In doing so, the draft Regulation –addresses an issue (i.e. that of the "role" of platforms in the distribution chain) that was never discussed or even mentioned during the various consultation phases organized over the last two years.

6. In addition, the Commission's strict approach towards platforms appears to be in direct contradiction with the primary objective of the draft Regulation and creates a new area of legal uncertainty both for platforms and for companies that use their services.

7. On the merits, the APDC overall considers that the categorization of platforms as suppliers is purely artificial and does not take into account reality.

8. Indeed, it is important to remind the Commission that the hybrid model (i.e. acting both as intermediaries and buyers/resellers) is increasingly used by platforms (this is notably the case of the three leading marketplaces in France), but also that more and more traditional retailers are adopting a hybrid model, whether through the development of marketplaces or the use of the online consignment model.

9. The impact (in our opinion unmeasured) on legal certainty is reinforced by the fact that the interaction between brands, retailers and platforms is precisely the fundamental challenge of the digital environment for the next 10 years.

10. Another immediate consequence of qualifying platforms as "suppliers" is that providers of online intermediation services can no longer qualify as "agents" for the purpose of applying Article 101(1) of the TFEU.[3] The draft VGL considers that

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1 "*The online platform economy plays an increasingly important role in the distribution of goods and services. The undertakings active in the online platform economy enable new ways of doing business, some of which are not easy to categorise using the concepts traditionally associated with vertical relationships between suppliers and distributors in the brick-and-mortar environment. <u>However, where such undertakings are providers of online intermediation services, it is appropriate to categorise them as suppliers under this Regulation</u> (…)*"

2 "*'supplier' includes an undertaking that provides online intermediation services irrespective of whether it is a party to the transaction it facilitates; 'online intermediation services' means services that allow undertakings to offer goods or services to other undertakings or to end users with a view to facilitating direct transactions between such undertakings or between such undertakings and end users, irrespective of whether and where those transactions are ultimately concluded, and that constitute information society services within the meaning of point (b) of Article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council*"

3 Draft VGL, para. 44

providers of online intermediation services allegedly benefit from "strong network effects" and strong bargaining power and that, consequently, they determine the conditions of sales and strategy. As such, they cannot benefit from the derogation.

11. By contrast, in paragraph 179 of the VGL, the Commission considers that "Article 4(a) VBER prohibits the online intermediation services provider from imposing a fixed or minimum sales price for the transaction that it facilitates". In other terms, according to the VGL, users of the platform will still bear the largest part of the risk of the transaction by defining the retail price and thus the commercial positioning of the products listed on the platform.

12. Finally, this choice of the Commission is inconsistent with other applicable regulations which place platforms under an ad hoc regime. As it creates a high level of legal uncertainty as to the application of the future VBER to these platforms, the APDC can only regret that this was not further discussed and explained prior to the present consultation.

II. The exception for dual distribution

13. Similar to the currently applicable version of the VBER, the draft revised VBER provides that its exemption does not apply to vertical agreements entered into between competing undertakings, except in situations of dual distribution. However, while the VBER considers that dual distribution covers all situations where "*the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level*"[4] (or alternatively where "*the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services*"), the European Commission now considers in its draft revised VGL that "*whether an agreement can be considered a dual distribution agreement for the purposes of applying Article 2(4)(a) or (b) of VBER should be interpreted narrowly due to the exceptional nature of this provision*".[5]

14. Accordingly, the draft revised VBER provides that a vertical agreement between a supplier of goods or services engaging in dual distribution and a distributor/buyer should only be block exempted in full where the parties' aggregate market share in the relevant market at the retail level does not exceed 10%.[6] If the parties have an aggregate market share at the retail level that exceeds 10% but otherwise have individual market shares that remain below the thresholds set out in Article 3, the

4 Article 2(4)(a) of the VBER.

5 Draft vertical guidelines, recital 87.

6 Draft revised VBER, Article 2(4). The APDC would like to point out that the French translation of "*their aggregate market share*" in Article 2(4) is unclear and should be corrected.

block exemption would apply except as regards any exchange of information between the parties.[7] In addition, the draft revised VBER excludes providers of online intermediation services from the benefit of the safe harbour when they sell goods or services in competition with undertakings to which they provide online intermediation services.[8]

15. Although the APDC welcomes the fact that the European Commission decided to maintain the principle of the exemption for dual distribution and to clarify which categories of undertakings may benefit from it (**1**), the APDC considers that narrowing the scope of the exemption for dual distribution is not warranted based on experience **(2**). Moreover, the additional 10% threshold introduced by the draft revised VBER is likely to prove impractical and overly restrictive in practice (**3**) and while the draft revised VBER excludes all information exchanges from the benefit of the block exemption, the draft vertical guidelines do not provide any clear guidance as to the information that can still be legitimately exchanged in the context of dual distribution with respect to the vertical aspects of the relationship (**4**). Finally, the APDC is doubtful that the exclusion of all providers of online intermediation services from the exemption of the VBER is warranted for a business model that is currently in development **(5)**.

1. Preservation of the exception for dual distribution and clarifications regarding its scope

16. In its previous Paper dated March 26, 2021, the APDC pointed out that its members have not experienced particular difficulties with the application of the exception for dual distribution as it currently stands and have not witnessed any obvious enforcement gap in that regard – including in the context of online sales. The APDC also noted that the Commission did not appear to have identified specific issues either, as the public consultation only referred to "*risks of horizontal competition concerns*" in a general way.

17. Given the above and considering the potentially pro-competitive effects of dual distribution on intra-brand competition, the APDC welcomes the Commission's decision to maintain the principle of an exemption for dual distribution in the draft VBER, and to clarify that it applies not only to suppliers, but also to wholesalers and importers who engage in the sale of goods or services at the retail level.

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7 Draft revised VBER, Article 2(5). The APDC believes that Article 2(5) (as well as the explanatory note) may be misleading, as it suggests that the partial exemption would only be available provided that the supplier and the buyer's aggregate market share at the retail level does not exceed 30% ("*If the competing supplier and buyer referred to in Article 2(4)(a) or (b) have an aggregate market share that exceeds [10]% in the relevant market at retail level but that does not exceed the market share thresholds of Article 3*").

8 Draft revised VBER, Article 2 (7).

18. However, the APDC considers that the proposal provided for in Article 2(4) to (7) of the draft VBER excessively reduces the scope of the safe harbour compared to the existing situation.

19. The introduction of a new threshold combined with the treatment of information exchanges overly complicates the individual self-assessment required from companies in order to determine if they qualify for the full exemption. In practice, this risks deprives almost all dual distribution agreements of benefiting from the full exemption, thereby creating legal uncertainty.

20. As a result, suppliers could be disincentivised to engage in dual distribution or maintain an existing dual distribution system, thereby potentially depriving customers from an additional distribution channel to the detriment of intra-brand competition.

2. Lack of rational for narrowing the exemption for dual distribution

21. Article 2(4) of the draft revised VBER limits the current safe harbour for dual distribution to situations where the parties' aggregated market share in the retail market does not exceed 10% (instead of 20% in the previous proposal). This very low threshold implies that most distribution agreements in the context of dual distribution would no longer be (fully) exempted.

22. If the parties have a combined market share at the retail level exceeding 10% but otherwise remain below the thresholds of Article 3, the draft revised VBER provides that their agreements will only benefit from a partial exemption not covering the exchanges of information between the supplier and its distributors.[9]

23. The APDC considers that the rationale for narrowing the exemption for dual distribution is unclear. Dual distribution is not a new phenomenon. It is widespread in many industries and has become even more common in the past 15 years as a result of the development of online sales (*e.g.*, suppliers have developed direct distribution channels through their websites). The changes proposed by the Commission would therefore affect a very large number of economic sectors, and have a major impact on the economy.

24. Economic literature generally acknowledges that dual distribution may generate efficiencies. Multi-channels distribution may enable suppliers to best tailor their distribution model to the specific needs of customers. For example, large customers may be best served by the supplier directly, as they typically require centralized negotiation and large volumes. By contrast, a network of local distributors may be

[9] Draft revised VBER, Article 2(5).

necessary to meet the demand requiring physical distribution with a large territorial coverage. As a result, consumers may benefit from a broader offer among a range of outlets offering different services and take advantage of increased intra-brand competition.

25. Dual distribution may also stimulate inter-brand competition. Dual distribution can be a way for suppliers to gather data on customers and have better knowledge of their preferences (in particular in the context of the digital economy where data gathering has become a key competitive parameter). Such data may enable suppliers to better meet the demand and to compete more effectively with rivals. In turn, suppliers' investments in a direct distribution channel may benefit its distributors through better brand image, brand awareness, quality standards, etc. Competition between the supplier and its distributors can be regarded as a joint effort to distribute the products and gain market shares.

26. On the other hand, the APDC is not aware of systematic competition concerns resulting from a supplier's choice to engage in dual distribution, including with regards to information exchanges. In particular, the APDC is not aware of any specific horizontal competition issues arising under the "protection" of the exemption for dual distribution.
    - Practices typically raising horizontal concerns, such as price collusion, market partitioning, or exchanges of commercially sensitive information at the retail level, are already caught under Article 101 (1) TFEU and are not exempted under the VBER. For example, the Danish Competition Council has recently sanctioned Hugo Boss for exchanging strategic information with its retailers in the context of dual distribution agreements.[10]
    - Likewise, potential anticompetitive practices that may be implemented by a dominant supplier (or a supplier with significant market power) vis-à-vis its distributors are already not covered by the VBER, since the benefit of the block exemption is excluded for suppliers with a market share above 30% on the upstream market.
    - In any event, the Commission has the power to withdraw the benefit of the block exemption where a vertical agreement has anticompetitive effects, regardless of the concerned supplier and distributors' market shares.[11] Such a tool is arguably sufficient to address possible concerns that may be raised by dual distribution without warranting the need to reduce the scope of the exemption.

27. In this context, the introduction of an additional market share threshold to narrow the scope of the exemption for dual distribution appears questionable. Under the

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10 Decisions of the Danish Competition Council of 24 June 2020, *Hugo Boss/Kaufmann* and *Hugo Boss/Ginsborg*, where the communication by Hugo Boss of information concerning its future retail sales to two of its independent retailers was treated as a horizontal concern and, consequently, as a restriction by object.

11 European Commission Guidelines on Vertical Restraints, recitals 74-75.

new scope of the exemption, a very large portion of current dual distribution systems would not be fully covered by the VBER's safe harbour. This could in turn encourage suppliers to either entirely abandon any form of direct sales to consumers, depriving those consumers of an alternative source of supply, or, conversely, to internalise the distribution of their products by setting up fully-owned distribution networks or by entering into agency agreements with formerly independent distributors – which would reduce intra-brand competition, thereby depriving consumers from the associated benefits.

28. The Commission may have tried to mitigate the strict approach of Article 2(4) of the draft revised VBER by providing an additional, but more limited, safe harbour for dual distribution where the supplier and its distributors have an aggregated market share at the retail level above 10% but nevertheless comply with the thresholds of Article 3.[12] This additional provision would enable to exempt all aspects of the vertical agreement, except for any information exchange between the parties. However, the purpose of this "grey zone" providing for a partial exemption is unclear.

29. As explained above, practices usually raising horizontal concerns (*e.g.,* price collusion, market partitioning, exchanges of commercially sensitive information) are already caught by Article 101 (1) TFEU and are not covered by the VBER. Moreover, excluding all types of communications between a supplier and its distributor from the benefit of the exemption is questionable since at least some level of communication is inherent to the supplier-distributor relationship,[13] and could result in the "grey zone" being of limited practical use and dual distribution schemes being *de facto* be excluded from the exemption as soon as the parties combined market share at the retail level is above 10% (*see* section 4, below).

3. Impracticality of the new market share thresholds

30. The introduction of a new market share threshold at the retail level would make the application of the exemption for dual distribution particularly complex and uncertain.

31. Under the draft VBER, three different thresholds would have to be complied with in order to (fully) benefit from the exemption: (i) the supplier's market share on the selling market should not exceed 30%, (ii) the distributor's market share on the purchase market should not exceed 30%, and (iii) the combined market share of the supplier and the distributor at the retail distribution level should not exceed 10%.

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12 Draft revised VBER, Article 2(5).

13 As acknowledged both by the Court of Justice of the European Union (see ECJ, judgment of February 10, 2011, Case C-260/09 P, *Activision Blizzard Germany v. Commission*, para. 72), and national competition authorities, including the French Competition Authority (see decision no. 20-D-04 of March 16, 2020, para. 585) and the German FCO (see *Bundeskartellamt* press release of July 2017, "Guidance note on the prohibition of vertical price fixing in the brick-and-mortar food retail sector", para. 95).

32. The new 10% threshold at the retail level would raise major difficulties and concerns with respect to its practical implementation, as it would be extremely time consuming and costly for both suppliers and distributors to assess whether they fall below the thresholds or not. Properly defining markets in vertical relationships is already challenging and it should be noted that retail markets are often local in scope, leading to the need to define multiple (often hundreds of) catchment areas, based on market definitions that may vary significantly from one Member State to the other. In cases where a global supplier has a network of local distributors covering the EU, dual distribution agreements would benefit from the exemption only after analysing market shares in each catchment areas in the EU – which would be clearly unrealistic in most situations.

33. The lack of reliable information on market shares at the local level would therefore make the implementation of the new threshold impossible or extremely burdensome and costly. Moreover, assessing the impact of online sales in a given catchment area would make the calculation of combined market shares at the retail level even more complicated, if not impossible. It would also reinforce the risk of divergence between Member States, where online sales may be taken into account differently when calculating retail market shares. For example, the French Competition Authority has defined a methodology to reflect the impact of online sales at the local level which is not necessarily relevant to the situation in other Member States or followed by other regulators.

34. In addition, it is doubtful whether the suggested additional threshold would constitute an adequate indicator of potential horizontal issues for the following reasons:
    - the new threshold fails to take into account the supplier's position at the production level, whereas a lack of intra-brand competition is very unlikely to raise issues if the product in question is characterised by strong inter-brand competition; and
    - in any case, the new threshold does not distinguish between the supplier and the distributor's position at the retail level, meaning that a supplier's ability to engage in direct sales to consumers could depend on its distributor's market shares, and therefore on whether said distributor markets products from brands competing with the supplier's or not.

35. As a result, in a situation where a multi-brand distributor has a market share above or equal to 10 % at the retail level, a supplier could be prevented from engaging in any retail distribution activities, regardless of its market share at the production level. The new threshold would therefore fail to foster intra-brand competition whenever the market is characterised by a limited number of strong, multi-brand distributors.

36. For all the above-mentioned reasons, the APDC considers that the introduction of the new 10% threshold at the retail level is unworkable in practice. As a result, companies will likely assume that they exceed the 10% threshold in at least one catchment area, and that they should conduct the self-assessment under the "grey zone" criteria. This means that information exchanges would be considered excluded from the benefit of the exemption in all situations.

4. Need of further guidance regarding information exchange between suppliers and distributors in case of dual distribution

37. While the draft revised VBER excludes any information exchange from the scope of the exemption in the "grey zone" when the parties have a combined market share that exceeds 10% at the retail level but otherwise meet the requirements of Article 3, the draft revised guidelines do not provide further guidance as to which specific aspects of the relationship between the supplier and its distributors may be problematic, and what other aspects would not normally raise concerns under Article 101 TFEU and should therefore continue to benefit from an (individual) exemption.

38. Yet as indicated above, it stems from both the Court of Justice's case law and the decisional practice of national competition authorities that in the context of a vertical relationship between a supplier and a distributor, a certain measure of information exchanges is legitimate and, in fact, necessary.[14] In particular, suppliers generally request that distributors report information regarding volumes of sales and inventory, and such information arguably needs to be shared for the supplier-distribution relationship to be workable in practice. For example, the Commission never questioned the necessity of significant information exchanges in the context of franchising agreements (covering information as diverse as volumes of sales, inventory, promotional materials, organisation of stores, employees training, etc.), even though a franchisor may compete with its franchisees in the same way as a supplier may compete with its distributors.

39. As a result, excluding all exchanges of information from the scope of the safe harbour (unless the parties are somehow able to ascertain that their combined market share at the retail level remains below or equal to 10% in all relevant geographic markets, which as described above is unlikely to be feasible) would effectively be viewed by companies as a major hindrance to operate a successful dual distribution system – thus creating legal uncertainty and potentially depriving customers of alternative sources of supply to the detriment of intra-brand competition.

40. Consequently, unless the Commission provides very clear guidance on information exchanges in the context of dual distribution agreements, and in particular specifies

[14] See footnote 10.

which information may be freely shared, shared but segregated behind firewalls within the supplier, or completely avoided, the APDC considers that the proposal would result in a *de facto* removal of the exception for dual distribution.

5. Exclusion of providers of online intermediation services from the benefit of the safe harbour

41. Article 2(7) of the draft revised VBER excludes providers of online intermediation services from the benefit of the safe harbour when they sell goods or services in competition with the companies to which they provide online intermediation services.

42. The APDC considers that the rationale for the outright exclusion of suppliers of online intermediation services from the benefit of the VBER in the context of dual distribution is unclear.

43. First, it is unusual under the VBER to give a specific treatment to a given business model. The overall logic of the VBER is to decide whether an exemption should be granted or not, based on the likely impact on competition of the vertical agreement rather than based on the business model of the companies at stake.

44. Second, the APDC has not observed that all dual distribution agreements involving suppliers of online intermediation services potentially raise anti-competitive concerns and should be excluded from the scope of the block exemption. A great diversity of undertakings act as suppliers of intermediation services and it cannot be assumed that these companies all have market power in a way that could raise competition concerns.

45. In particular, there is an increasing number of small platforms of intermediation services, whose activities are unlikely to raise concerns *per se*. Moreover, with the development of online sales, more and more suppliers have started creating their own marketplaces to extend their offering to products other than their own and try to compete more efficiently against large platforms, to the benefit of consumers. Removing the benefits of the exemption for all providers of online intermediation services as soon as they also sell competing products could discourage the emergence of new competitors offering intermediation services or, alternatively, discourage suppliers of online intermediation services to start distributing products directly as well.

46. Thus, excluding all suppliers of intermediation services from the exemption for dual distribution may ultimately and paradoxically have detrimental effects on competition. Such an exclusion seems all the less warranted that (i) practices

implemented by the larger intermediation service providers may still be caught under Article 102 TFEU, and (ii) potentially problematic exchanges of information would in any case be deprived of the benefit of the exemption under Article 2(5) of the draft VBER. The contemplated exclusion would therefore impact mainly smaller intermediation platforms, which activities are unlikely to raise competition issues.

III. Active sales restrictions

1. Exclusive distribution

47. First, the APDC would like to thank the Commission for its clear reminder at para. 98 of the Draft Vertical Guidelines that a supplier is free to set up its distribution system as it sees fit. The fact that suppliers should be able to choose how to market their products or services and what is the most appropriate distribution model for doing so is a key principle.

48. The APDC also commends the greater flexibility offered by the Regulation and the Draft Vertical Guidelines allowing suppliers to better protect their resellers' investments and their distribution networks. In particular, the following points are useful:

    (i) The protection offered to selective distribution by being able to restrict active and passives sales by an exclusive distributor to unauthorised resellers in a country where selective distribution is operated.

    (ii) Clarification that combination, within the EEA, of different distribution models is possible.

    (iii) Protection of both exclusive distribution and selective distribution in a free distribution scheme.

    (iv) Clarification that the supplier can accept a restriction of both its passive and active sales.

49. Beyond these general comments, the APDC would like to comment on two specific concepts introduced in the Draft Guidelines at para. 102 (shared exclusivity) and 206 (pass on).

50. With respect to shared exclusivity, the APDC understands that, in an exclusive distribution scheme, it is now possible to **appoint more than one exclusive distributor for a particular territory** if the number of exclusive distributors appointed remains proportionate. On this, the APDC would welcome confirmation that it is now allowed for two distributors to operate on the same territory without having to

allocate a precise share of this territory to each of them (e.g., two exclusive distributors operate in Paris without the need to allocate North Paris to the first one and South Paris to the second one). On the basis of the Expert report on active sales p. 36, we assume that this solution is the one envisaged by the Commission, but we would welcome confirmation on this point as the case may be using a concrete example.

51. **Pass on concept** – The APDC also noted a new concept of "pass on" under Article 4 b) (i) and para. 206 of the Draft Guidelines.

52. The APDC understand that this "pass on" concept is meant to address a difficulty raised by the Expert report (at page 27) whereby the current framework does not allow companies to *"limit the active sales by the customers or the buyer"*, with the latter being defined in the Vertical Guidelines as *"an undertaking which purchase the contract goods or services from a buyer which is a party to the agreement"*.

53. Nonetheless, the APDC would welcome more clarity, possibly with examples, about what the Commission intends to cover with this concept. In particular, the sentence below under para. 206 would need to be clarified so as to explain more explicitly the scenario envisaged by the Commission.

> *"To protect the investment incentives of exclusively appointed distributors, the supplier may require that such* ***other distributors****, and* ***their customers that have entered into a distribution agreement with the supplier*** *or* ***with a party that was given distribution rights by the supplier****, are restricted from engaging in active sales into the exclusively allocated territory or to the exclusively allocated customer group (i.e., to pass on the active sales restriction to the buyer's customers)"*. [Emphasis Added]

2. Selective Distribution

54. First, the APDC welcomes the new Article 4(c) of the draft VBER which gives selective distribution systems an enhanced protection against sales by unauthorized distributors which are located in territories not covered by selective distribution.

55. With respect to territorial protection, pursuant to the current VBER and VGL, the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement sells the contract products or services was prohibited, except when the restriction of sales by the members of a selective distribution system concerns unauthorized distributors operating within the territory reserved to the supplier (article 4, b) iii)).

56. Under the new formulation of article 4 (b) (ii) and article 4 (d) (ii) of the draft revised VBER, a supplier is now allowed to restrict active or passives sales by the distributor as well as its customers which operate in a territory not covered by a selective system (either exclusive or not), to unauthorized distributors located in a selective system territory. Under this new formulation, the Commission provides a clear position on the fact that a combination of exclusive/non exclusive distribution in certain geographic markets and selective distribution in other areas can be applied without losing the necessary protection against parallel sales from non selective territories into selective territories. The Commission acknowledges that a supplier can lead different distribution strategies within Europe depending on the maturity of each market and the extension of this protection to the customers of the non selective distributors is much welcomed.

57. The APDC also commends the Commission revised approach to the equivalence criteria in para. 221 of the Draft Vertical Guidelines and the fact that non-equivalence is not anymore identified as a hardcore restriction, provided that differentiating between online and offline sales in selective distribution systems does not amount, directly or indirectly, to a *de facto* restriction of online sales.

58. That being said, the APDC would welcome additional guidance in the Vertical Guidelines as to which situations could, in practice, give rise to a restriction of online sales. In this respect, the APDC notes that the examples of specific criteria that can be applied to online distributors listed in para. 221 do not address the issue of actually imposing different criteria to online retailers and brick and mortar shops. To the contrary, the online criteria listed as examples under para. 221 (set-up and operation of an online after-sales help desk, requirement to cover the costs of customers returning the product) seem to be overall equivalent to criteria that could be applied to brick and mortar shops. It is thus unclear, from reading para. 221 of the Draft Vertical Guidelines if, despite the removal of the equivalence principle, in practice the supplier would still be under the obligation to maintain a general consistency amongst the requirements applicable to online and offline sales in order to benefit from the block exemption.

59. More generally, the APDC would also like to share a number of comments on the Commission's approach to selective distribution that are described below.

60. First, an interesting step could be to envisage that a sale to unauthorized distributors is not only an exception to the restrictions on active/passive sales but a fault under national laws in order to make the protection of networks more effective - knowing that only France has recognized the responsibility of the distributor selling outside of the authorized network.

61. Then, the APDC notes that, in the draft VBER, the Commission maintains the prohibition to restrict cross-supplies between the members of the selective

distribution system operating at the same or different levels of trade (article 4 (c) (ii)). As a result, a supplier that sets up a selective distribution network in several Member States and uses wholesalers to set up and run its network in a defined territory still cannot restrict active sales by its wholesalers to authorized retailers located in the territory of another wholesaler. The combination of exclusivity and selectivity at different trade levels thus remains prohibited. We would welcome a change of approach in this respect in the final version of the VBER and VGL.

62. The draft guidelines also indicate that cross-supplies between authorized distributors must normally remain free (para. 168 of the draft VGL). This same paragraph provides for an exception, close to para. 63 of the current framework, according to which *"if authorised wholesalers located in different territories are obliged to invest in promotional activities in the territory in which they distribute the goods or services concerned in order to support the sales by authorised distributors and it is not practical to specify in a contract the required promotional activities, restrictions on active sales by these wholesalers to authorised distributors in other wholesalers' territories to overcome possible free-riding may, in an individual case, fulfil the conditions of Article 101(3)"*.

63. This exemption however concerns a very specific scenario, which requires to conduct an individual assessment under Article 101(3) TFEU. This exception is not covered by the VBER. The APDC considers that the conditions to benefit from this exception remain unclear and lack of practical relevance, as pointed out in the Expert report on the review of the Vertical Block Exemption Regulation. Its formulation, in particular the fact that *"it is not practical to specify in a contract the required promotional activities"* can give rise to divergent and subjective interpretation, and consequently entails high uncertainty for undertakings. As pointed out in the Expert report, businesses and practitioners fail to see the case where a supplier would have sufficient certainty that this condition is met and cannot be disputed.

64. The APDC considers that expressly allowing exclusivity at the wholesale level within a selective distribution system and ensuring a harmonized interpretation of the rules by the NCAs would provide greater legal certainty to businesses and have a very positive impact in that respect. This would create more tightness in the networks, resulting in a concentration of sales efforts in a given territory and a reduction in the risk of free riding, protecting the efforts and investment of the wholesalers concerned.

3. Dual pricing (Draft VGL para. 195)

65. The draft VGL indicates that dual pricing i.e., the fact that a distributor/manufacturer charges a different price to the same reseller for the products intended to be resold online or offline, can benefit from the safe harbour if it is intended to incentivise or

reward the appropriate level of investment respectively made online or offline (para. 195).

66. The APDC would like to make a few comments in this respect:

    (i) We would first welcome a clearer statement at para. 195 that dual pricing no longer constitutes a hardcore restriction of competition. Indeed, as currently drafted, para. 195 gives the impression that dual pricing can only be exempted in exceptional circumstances while, as mentioned in the APDC's contribution of March 2021, dual pricing can have pro-competitive effects which outweigh potential negative effects. A case by case assessment is therefore warranted.

    (ii) The assessment of the price difference in light of the costs incurred by each channel is likely to raise practical difficulties. The APDC would suggest that the Commission confirms that the supplier does not need to conduct a complex cost analysis but merely needs to verify that any price difference is justified by higher investments required by any of the two channels. In addition, given the variety of situations, the APDC is of the opinion that other criteria / circumstances could be taken into account by the supplier when deciding to impose a different price to a distributor depending on whether the latter sells online or offline; for example, specific commitments or investments by the distributor in one channel could be enough to justify dual pricing, without the supplier having to perform a complex cost analysis.

67. Finally, as already suggested in our contribution of March 2021, the ADPC would welcome a mention in the new VGL that price discrimination between distribution channels does not constitute a hardcore restriction.

III. Parity obligations

68. In its previous contribution regarding the draft VBER, the APDC had welcomed option 2 proposed by the Commission, i.e., *"the benefit of the block exemption should be removed for parity obligations, but only for parity obligations that relate to indirect sales / marketing channels (e.g. other platforms / intermediaries)".*

69. The ADPC had further insisted that an analysis by the effects would be relevant since, in any case, the companies implementing these clauses and which would hold more than 30% of market shares could not benefit from the exemption of the regulation.

70. The ADPC is therefore pleased that the revised draft VBER removes the benefit of the block exemption for such across-platform retail parity obligations imposed by

providers of online intermediation services and that this type of parity obligation is added to the list of excluded restrictions of Article 5(d) of the revised draft VBER.

71. In its contribution of March 2021 regarding the draft VBER, the APDC had also stressed that the VBER and the VGL did not provide sufficient guidance on how to assess the compatibility of parity obligations with Article 101 TFEU, thus resulting in a divergent treatment of these restrictions by NCAs and in legal uncertainty for operators.

72. The APDC is therefore pleased that the revised draft VGL devotes lengthy passages to the criteria that operators must take into account when assessing the legality of such parity obligations.

73. In this regard, the APDC has noted that, for the assessment of across-platform retail parity obligations, key factors are (i) the share of buyers of the online intermediation services that are covered by the obligations, (ii) the homing behaviour of buyers of the online intermediation services and of end users (how many intermediary platforms they use), (iii) the market position of the supplier that imposes the obligation and of its competitors, (iv) the existence of barriers to entry to the relevant market for online intermediation services, and (v) the impact of direct sales by buyers of the services (para. 338).

74. Regarding retail parity obligations relating to direct sales channels, it is explained in the VGL that, for the assessment of this type of restriction, relevant factors include the market position of the supplier that imposes the parity obligation, the relative size of the direct sales channels covered by the obligation, the substitutability of the direct and indirect channels from the perspective of the suppliers of the goods or services and of end users, and whether the restrictions are imposed by multiple suppliers of intermediation services (cumulative effects).

75. This analysis grid corresponds in substance to the assessment that the ADPC had elaborated in its previous position paper.

IV. Other aspects

1. RPM

76. In its contribution to the public consultations launched by the Commission during the revision process, the APDC had encouraged the Commission to propose a more flexible approach toward RPM by removing this practice from the hardcore category list and applying a more effects-based approach. The APDC had also explained that it would welcome more guidance on the possible efficiency gains likely to justify, under certain circumstances, an exemption and, additional clarity on the exceptions foreseen by the VGL. The APDC will not come back in details on its previous comments and rather refers back to its contributions of November 20th, 2020, and March 25th, 2021, in this respect.

77. The APDC acknowledges the Commission's choice to maintain the current framework with respect to RPM in the draft VBER and VGL. Beyond the overall approach, the APDC is disappointed by the limited clarification efforts provided in draft Vertical Guidelines on RPM. In particular, the APDC would like to take the opportunity of this consultation to make the following comments regarding the Commission's position:

(i) The APDC disagrees with the statement made at para. 181(a) of the draft VGL pursuant to which *"the direct effect of RPM is the elimination of intra-brand price competition by preventing all of certain distributors from lowering their sales price for the brand concerned"* (emphasis added). Indeed, as put forward by certain authors[15], RPM can be employed to encourage lower prices, or avoid too high prices. We would welcome deleting reference to "direct effect" and using a more balanced wording such as *"potentially preventing all or certain distributors from lowering their sales price"*.

(ii) Furthermore, in the aim to providing suppliers with more legal certainty, the APDC encourages the Commission to confirm the possibility to impose on distributors an obligation to pass on to consumers the benefits of suppliers' promotions, independently of a new product launch or a short-term campaign.

(iii) The APDC would also welcome clarification that, under the scenario at para. 182(a), the supplier can impose a fixed price for a new product introduced on the market even if the supplier does not sell the product directly to the distributor.

15 https://www.cresse.info/wp-content/uploads/2020/02/2017_pa1_pa2_Resale-price.pdf; Vertical-restraints.pdf (fne.gob.cl) ; Vertical-restraints.pdf (fne.gob.cl).

(iv) Finally, under para. 182(b), the APDC would welcome clear confirmation from the Commission that the supplier can fix prices during the short-term promotion campaign and that this exception is not limited to franchise or similar networks. It would also be useful to understand what the maximum duration acceptable would be for a short-term promotional campaign.

2. Minimum advertised prices (MAPs) and price monitoring

78. Price monitoring (para.176) and MAP's (para.174) are two new developments of the draft VGL for which additional clarity would be very much needed.

79. MAPs – It is unclear if the Commission envisages MAPs either as merely an element within a body of evidence demonstrating an RPM practice or as a distinct new infringement of competition law. Clarification in this respect would be useful. The APDC would welcome some references to the case law used by the Commission in its reasoning in this respect so as to give undertakings a better understanding of the concept and provide them with more legal certainty as to which situations could be regarded as potentially unlawful.

80. Price monitoring – The APDC commends the Commission's confirmation that price monitoring does not constitute RPM as such. However, similarly to MAPs, additional guidance and practical examples on price monitoring seem important so that to allow a proper assessment of the situations that may or may not raise competition concerns.

3. Fulfilment contracts

81. The APDC commends the flexibility introduced by the Commission at para. 178 regarding fulfilment contracts. However, the way the draft VGL are drafted at this stage does raise some questions.

82. In particular, the APDC believes that the following points should be clarified:

(i) First, the APDC understands that online platforms are the context in which fulfilment contracts are considered by the Commission at para. 178. However, price negotiations between suppliers and large customers, qualifying as fulfilment contracts, (i.e., where the agreement is executed by a third party not party to the agreement) also take place in many sectors outside the online platforms space. In practice, large customers often favor direct negotiation with suppliers to avoid multiple discussions with intermediaries and to secure large volumes and better prices. Hence, in many sectors the actual competition takes place when the supplier and the end-customer negotiate, not afterward. In such scenario, in most of the cases, the customer choses the intermediary in charge of logistics but also invoicing. As a result, the intermediary chosen by the customer

often purchases and resells the products for a very short period of time which, under the current framework, raises undue antitrust risks.

(ii) The APDC notes that, under para. 178, a fulfilment contract would be exempted only if the end-customer has *"waived its right"* to indicate the company that should execute the agreement. In this respect, the APDC suggests the following changes: either removing the reference to a waiver which purpose is unclear and raises additional interpretation difficulties or specify that the party able to waiver the right to choose the company executing the agreement is the end-customer or the supplier.

4. Sustainability

83. The APDC had understood that the Commission intended to insert some developments concerning the green deal and more generally efficiencies linked to sustainability in the next generation VBER and Vertical Guidelines. This intention was included in the Commission Inception Impact Assessment of 23rd October 2020 and was reiterated very recently (10 September 2021) when the Commission explained, following feedbacks received in the framework of its public consultation, where competition policy needs to be clarified in relation to sustainability objectives. In this context, the APDC understands that the Commission acknowledged that more guidance is needed to encourage companies to jointly invest in and produce more sustainable products and confirmed that those guidelines will be included in upcoming revisions to the Horizontal and Vertical block exemption regulations.

84. In light of the importance of this topic, the ambitions of the Commission and its recent statements, the APDC therefore encourages the Commission to take into account sustainability as part of the possible efficiency arguments that undertakings should be able to put forward to seek an exemption.

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